

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 52510
Issued to: Gordon A. RADER

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2421

Gordon A. RADER

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 12 April 1985, and Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended Appellant's license for two months outright upon finding proved the charge of negligence. The specification found proved alleges that while serving as Operator aboard the TUG WESTERN COMET, under the authority of the captioned document, on 26 April 1984, Appellant failed to maintain a proper lookout, contributing to a collision with a pleasure vessel on the Willamette River at approximately river mile 3.5.

The hearing was held at Seattle, Washington, on 5 February 1985.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence ten exhibits and the testimony of two witnesses.

In defense, Appellant introduced in evidence two exhibits, his own testimony, and the testimony of one additional witness.

After the hearing the Administrative Law Judge rendered a decision in which he conclude that the charge and specification had been proved, and entered a written order suspending all licenses and endorsements issued to Appellant for a period of two months outright.

The complete Decision and Order was served on 18 April 1985. Appeal was timely filed on 10 May 1985 and perfected on 12 September 1985.

FINDINGS OF FACT

At all relevant times on 26 April 1984, Appellant was serving as Operator aboard the M/V WESTERN COMET under the authority of his license which authorizes him to serve as Operator of Uninspected Towing Vessels. The M/V WESTERN COMET is a steel hulled towing vessel of 299 gross tons, 115 feet in length. The Western COMET, pushing a tow made up of three barges side-by-side preceded by two lead barges, was proceeding downstream on the Willamette River, Oregon, at a speed of approximately four knots, approaching the confluence of the Willamette River and the Columbia River. Because of the height of the barges, Appellant's vision was obstructed for a distance of approximately 600 feet ahead of and 200 feet on each side of the lead barges. The weather was clear, visibility was excellent, and the water was calm.

The WESTERN COMET was manned by a crew of five persons consisting of Appellant, another operator, and three deckhands. At approximately 1200 on 26 April 1984, Appellant relieved the other operator and assumed control of the vessel. Appellant remained alone in the wheelhouse while the other operator and a deckhand proceeded to the galley for lunch, where they joined the other two deckhands who were already there.

Near Mile 3.5 on the Willamette River were a number of small pleasure fishing vessels. This is a popular recreational fishing area, described by some commercial vessel operators as a "continuing problem." Appellant was aware of this problem. He observed the fishing vessels ahead as the WESTERN COMET proceeded downriver, and sounded the danger signal on the vessels whistle. Upon hearing the whistle, two deckhands immediately left the galley and proceeded from the WESTERN COMET onto the barges for the purpose of assuming lookout duties. Prior to reaching his station as a lookout, one of the deskhands saw two men in the water. He informed Appellant of this fact via his portable radio, and Appellant stopped the flotilla's forward movement within a short distance.

A subsequent investigation revealed that the tow had struck a 17-foot motorboat, the BETTY ANN II, with a fishing party of three persons on board. The operator of the BETTY ANN II had been unable to start his outboard motor to move his boat from the path of the oncoming flotilla. As the result of the collision, the operator of the BETTY ANN II was drowned. The other two occupants jumped from the motorboat prior to the collision, and were rescued by nearby boaters.

APPEARANCE: Alex L. Parks, Esq., Parks, Montague, Allen and Greif, 800 American Bank Building, Portland, Oregon 97205-3811

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends:

1. The specification was defective.
2. Appellant kept a proper lookout from his position in the wheelhouse.
3. Any negligence was that of the deckhands rather than Appellant.
4. The proximate cause of the collision was the negligence of the operator of the BETTY ANN II.

OPINION

1

At the hearing, and again on appeal, Appellant argued that the specification supporting the charge of negligence was defective. He contends that the specification as written "speaks in terms of the operator failing to maintain a proper lookout, " while the Coast Guard attempted to prove that Appellant failed to "see to it that a proper lookout was on duty." This argument is without merit.

A specification must be adequate to "enable the person charged to identify the offense so that he will be in a position to prepare his defense." 46 CFR 5.05-17(b) (Currently 46 CFR 5.25.). The specification in this case clearly alleged a failure to maintain a proper lookout. The term "maintain" means "to see to it that a proper lookout is on duty." Appeal Decision 1758 (BROUSSARD).

II

Appellant next contends that he was able to provide an adequate lookout from his position in the wheelhouse.

The applicable statute, Rule 5 of the Inland Navigational Rules, 33 U.S.C. 2005, provides:

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

Appellant points out that Congressional intent, as expressed

in Senate Report 96-979 which accompanies Rule 5, is to permit the watch officer or helmsman to serve as lookout under certain circumstances. The report states, in pertinent part:

On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety. S. Rep. No. 979, 96th Cong., 2d Sess. 7-8 (1980). (Emphasis supplied).

On the question of whether a lookout was proper, I have stated:

The adequacy of a lookout on board a vessel underway is a question of fact to be resolved under all existing facts and circumstances... [T]he Administrative Law Judge was in the best position to determine whether the circumstances of the case permitted the helmsman to serve as a proper lookout.

Appeal Decision 2319 (PAVELEC). See also Appeal Decisions 2390 (PURSER) and 2046 (HARDEN). Where, as here, a flotilla is proceeding through an area where there are observed to be a great many recreational vessels and the configuration of the flotilla is such that the operator's view is significantly obstructed both ahead and to the side of the tow, I cannot say that the Administrative Law Judge's determination that the lookout was inadequate, was not reasonable. See Taylor v. Tiburon, 1975 A.M.C. 1229 (E.D. La. 1974) (Blind sport created by makeup of tow mandates posting a lookout aboard the barge.) The Administrative Law Judge's determination that the lookout was inadequate will not be disturbed.

III

Appellant next contends that the existence of a company policy requiring deckhands to act as lookouts precludes a finding that Appellant was negligent because the duty is already imposed upon the deckhands. This argument is specious. "[T]he operator of a vessel has a heavy responsibility to ensure proper operation of his

vessel." Appeal Decision 2349 (CANADA). The record is devoid of any evidence to indicate that Appellant directed the deckhands to act in accordance with the company policy. The fact that Appellant, by his own admission (T-77, T-81), did not see the BETTY ANN II strongly suggests that his lookout was not properly located. Appeal Decision 2270 (HERBERT). The duty of keeping a proper lookout is "often termed the first rule of seamanship," (Senate Report 96-979, supra). It cannot be discharged by deckhands not specifically assigned as lookouts.

IV

Finally, Appellant contends that the proximate cause of the collision was the negligence of the operator of the BETTY ANN II. The fact that the operator of the other vessel may have also been negligent does not excuse Appellant's negligence. Contributory negligence is not a defense in these proceedings. Appeal Decisions 2402 (POPE), 2400 (WIDMAN) and 2319 (PAVELEC).

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision of the Administrative Law Judge dated at Seattle, Washington, on 12 April 1985 is AFFIRMED.

B.L. STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 25th day of March, 1986.